No. 15,045

United States Court of Appeals

For the Ninth Circuit

LOUIS L. MAIDEN,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*
UNITED STATES OF AMERICA,	*Appellant,*
vs.	
LOUIS L. MAIDEN,	*Appellee.*

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLANT, LOUIS L. MAIDEN.

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Subject Index

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STATEMENT OF JURISDICTION.

The appellant,[1] a seaman appeals from the judg-

[1]There are cross-appeals herein. Libelant below, is aggrieved by the failure to find in his behalf for the claimed negligence of respondent below, and for the breach of the traditional seaworthiness warranty. Respondent's cross-appeal questions the propriety of the maintenance award. Thus there are two "appellants". However, in this brief, libelant below will be referred to as the appellant.

ment below, which grants him maintenance for injuries sustained aboard appellee's vessel, but denies him the damages which he seeks because of appellee's negligence and the breach of its warranty of seaworthiness of the vessel, its appurtenances and its crew (Cl. Tr. 43-44),[2] upon Findings of Fact and Conclusions of Law made by the Court below (Cl. Tr. 35-42.)

JURISDICTION OF THE DISTRICT COURT.

The jurisdiction of the District Court is granted pursuant to the provisions of the Jones Act, 46 USC Section 688, under 46 USC Section 1241(a), Public Law 17, 78th Congress, under the General Maritime Law, Civil and Maritime, and under the provisions of 28 USC, Section 1331.

JURISDICTION OF THE COURT OF APPEALS.

The jurisdiction of this Court is granted by the provisions of Title 28 USCA 1291, which gives to this Court jurisdiction of all appeals from final decrees of District Courts of the United States.

QUESTION PRESENTED.

Whether, under Admiralty Rule 46½, the Trial Court's findings are so clearly erroneous as to leave

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[2]Reference is to Clerk's Transcript.

this Court with the definite and firm conviction that a mistake has been committed.

STATEMENT.

Appellant, the boatswain on appellee's vessel, the S/S LOMA VICTORY, was injured at sea on January 9, 1953. Since then, he has been, and still is, permanently disabled from sailing again.[3] This appeal does not present any substantial conflict of testimony. Indeed the credible evidence below is such as to obviate the need for any resolution of conflicting testimony, * * * for there is no real conflict. Hence, within the ambit of the *McAllister* case,[4] the cumulative significance of the weight of all the evidence is such as to permit this Court to find that as to the appellant, the judgment below is so clearly erroneous as to leave this Court with the definite and firm conviction that a mistake has been committed. That is so even though, arguendo, there may be some slight evidence to support the judgment.

Based upon the following factors, or upon any combination of them, or indeed upon any one of them, the appellant is entitled to a reversal of the judgment below.

I. Appellant was an experienced and careful seaman.

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[3]He is at this very moment still being treated for his injuries at the United States Public Health Service Hospital, i.e., Marine Hospital, San Francisco. See also Findings of Fact Nos. 14-20 (Cl. Tr. 39-40) and Conclusions of Law Nos. 2, 7 and 8 (Cl. Tr. 41).

[4]*McAllister v. United States,* 348 U.S. 19.

II. The weather was extremely rough from the beginning of the voyage, and for 8 continuous days thereafter.

III. From the very first day of sailing and up to the time when appellant was injured, the cement and concrete at the hawsepipe on the starboard side of the windlass broke frequently.

A. The defective "plugs" or "wedges" and the absence of good "plugs" or "wedges" caused the cement and concrete to break.

B. The failure to "lash" or "trice" the anchor chains, also caused the cement and concrete to break.

C. The absence of catwalks and lifelines at the forecastle head added to the danger which confronted appellant.

IV. Work parties were compelled to inspect the windlass and defective cement and concrete base at the starboard hawsepipe at least twice daily.

A. Only an emergency warranted an inspection on the deck on day of accident.

B. It was necessary to examine the starboard hawsepipe by viewing the front of the windlass.

C. On the day of the accident, appellant was ordered to check the cracked cement and concrete at the starboard hawsepipe of the windlass.

1. The chief mate did not accompany appellant on inspection tour; this was consistent with prior practice on other tours of inspection.

2. The officers' "bridge" was not always notified of work parties on deck; nor was it

the duty of appellant or any other unlicensed seaman to do so.

V. The ship's officers knew that appellant and others were to make an inspection at time of accident.

A. Officers on the bridge failed to observe the work party; if the watch officer had looked, appellant would have been plainly visible at his work.

1. A stand-by lookout on the starboard wing of the bridge would have seen appellant at work; the captain had refused to authorize a lookout there.

B. The bridge officer ordered the vessel to increase speed at 4:21 P.M. on January 9, 1953, while appellant was inspecting the broken cement, thus causing a sudden wave to break over the bow which injured appellant.

1. The deck log entry that the accident happened at "1617", i.e., at 4:17 P.M. on January 9th is wrong.

VI. Second Mate Mehallo was not a credible witness.

VII. Appellant is permanently disabled; he will probably never sail again.

ANALYSIS OF THE EVIDENCE.

I. APPELLANT WAS AN EXPERIENCED AND CAREFUL SEAMAN.

Appellant has sailed in the deck department since 1922, in all ratings, both licensed and unlicensed. (R.

129, lines 13-24; 164-167).[5] As boatswain on this vessel he had the complete confidence of the chief mate, his immediate superior (R. 509, lines 7-22), and always "went out of his way to do everything possible" (R. 498, lines 1-20). Murray, the chief mate put it this way:

> "Q. Now, Captain, do you know of any reason why Mr. Maiden went out on the deck as he did before meeting you to make that inspection, if you know?
>
> A. I take it that Mr. Maiden was a very fine sailorman and went out of his way to do everything he possibly could for me. He was efficient and naturally—possibly he wanted to take a little of the work off my shoulders at that time. Mr. Maiden, I will say, was first-class sailor, and he undoubtedly, repetition, as I say, he wanted to help me all he could. He knew the conditions on deck and that didn't warrant a lot of safety." (R. 498, lines 1 to 17.)

Appellee's expert conceded that appellant was not negligent in the manner in which he performed the inspection at the time he was injured. He also agreed that if the planes at the No. 2 hatch needed attention because of defective lashings, it was normal for appellant to go forward by using the starboard ladder to reach the foredeck, if he was under orders to attend the broken cement (R. 560, line 4 to R. 561, line 1). He also conceded that complete care and safety of equipment and appurtenances of the vessel itself required appellant to examine the hawsepipe from in

[5]Reference is to Reporter's Transcript on Appeal.

front of the windlass (Ex. 2 and 15)[6] as well as from its after end (Ex. 3) (R. 559, line 23 to 561, line 9).

II. THE WEATHER WAS EXTREMELY ROUGH FROM THE BEGINNING OF THE VOYAGE AND FOR 8 CONTINUOUS DAYS THEREAFTER.

The deck log (Appellee's Ex. B) shows that extremely heavy weather was encountered after the vessel left San Francisco on January 2, 1953. Log entries beginning with January 1, 1953, and down to January 9, when the accident occurred, contain such entries as for example: "heavy sea" (p. 31)[7]; "very high and rough sea"; "commence taking green seas" (p. 37); "vessel laboring in confused sea" (p. 41); and finally on January 7 to 9 inclusive, the weather was even worse than on the earlier days (pp. 49-53).

The weather was so bad and treacherous, with most of the force wind and pitching of the vessel being on the starboard side (R. 420, line 1 to 421, line 15) * * * the side on which appellant was injured, * * * so as to cause an order to be issued that no one was to go on deck except by permission of the chief mate or the captain (R. 318, lines 1-13). The second mate stated that on January 9, 1953, there were rough seas, gale winds and mountainous swells (R. 392, lines 7-11). Surrell, the ship's carpenter stated that on the day appellant was hurt the captain had told him (Surrell)

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[6]Unless otherwise stated, reference to exhibits is to appellant's (libelant's) exhibits.

[7]The deck log (Appellee's Ex. B) is numbered in pencil at the bottom of each page.

not to go onto the forepeak of the ship because the weather was so rough and the vessel was taking seas (R. 71, line 21 to 72, line 13). He had not gone on deck for 3 days prior to and including the day of the accident.

The vessel had to be "hove to" in order to permit the necessary repairs. This was because the weather was so bad the first day out of port, when the cement at the starboard hawsepipe first broke (R. 140, lines 1-25; 141, lines 1-5).

III. FROM THE VERY FIRST DAY OF SAILING AND UP TO THE TIME WHEN APPELLANT WAS INJURED, THE CEMENT AND CONCRETE AT THE HAWSEPIPE ON THE STARBOARD SIDE OF THE WINDLASS BROKE FREQUENTLY.

The first evidence of the break-up of the cement and concrete (Ex. 1) was about one to one and a half hours after the vessel left San Francisco. The repairs were made under the supervision of the chief mate, who, as the cement breakage continued, ordered the carpenter to use the makeshift of stuffing rags around the opening through which the chains extend into the chain locker, to prevent the entry of water therein (R. 40, line 11 to 43, line 21). Although the chief mate acknowledged that the carpenter did a good job under the circumstances (R. 486, line 19 to 487, line 7), he admitted that a good grade of cement would have withstood the weather. He further stated that the four or five available sacks of cement were of inferior quality and did not harden properly (R. 503, lines 3-17).

In normal weather, as the vessel rolls, there is a certain amount of sway of the chains leading into the chain locker through the hawsepipes. To reduce the sway, concrete or cement is poured onto blocks of wood, sometimes called "plugs" (Ex. 12), which encircle the chains. The result is that the chains are held "pretty tight," thus preventing any undue friction of the chains against the cement. Since one of the wooden blocks was defective, the starboard chain rubbed against the cement to such an extent that because of the extremely rough weather the cement cracked and the defective "plug" fell into the chain locker, thereby subjecting the cement to further friction, resulting in a constant break-up of the concrete (R. 43, line 22 to 47, line 15).[8] Under these circumstances, the failure to take the customary precaution of lashing or tricing the chains together resulted in more friction of chain against concrete, thus creating a constant condition of broken cement, requiring the daily check-up of the starboard windlass (R. 311, lines 21-24).[9]

A. The defective "plugs" or "wedges" and the absence of good "plugs" or "wedges" aboard the vessel caused the cement and concrete to break.

Appellee's witness, Captain Murray, who has been going to sea for 53 years, 30 of which he has sailed as Master (R. 484, line 11 to 485, line 13), virtually made out the appellant's case. Murray was corrobo-

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[8]This matter is more fully discussed in Section III-A of this brief, infra.

[9]This matter is also dealt with in Section III-B of this brief, infra.

rated by appellant's expert witness Captain Healy, who himself has been going to sea since 1918 (R. 533-534). Captain Murray admitted that the reason for the trouble at the hawsepipe was because "we didn't have some of the gear we would like to have used" (R. 522, line 20). The following colloquy took place between him and appellee's proctor:

> "Q. * * * I ask you this question, Captain, in regard to the cementing of the hawsepipes: In your experience during rough weather at sea is it necessary and proper to inspect the hawsepipes and their cement on occasions whether they are cracked out or cracking out or not? Isn't it usual to inspect the hawsepipes at sea in heavy weather, in any event?
>
> A. This is one of the few times in my life that we had the condition we had at this particular time. The majority of steamship companies have proper * * * This particular ship being an N S A [10] vessel and many operators have had her, and naturally we didn't have the gear we would like to have used." (R. 522, lines 6-20).

Even though he stated that inspections at the bow would normally be required (R. 523, lines 1-18) he was emphatic that the "wedges" were worn and needed special attention. He also stated "but if we had had proper cement we wouldn't have had any trouble at all" (R. 522, lines 22-25).

Appellee's expert, Captain Healy, explained the necessity of good "plugs" or "wedges" around the

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[10]National Shipping Authority.

chains at the hawsepipes, to eliminate the likelihood of the cement cracking at sea (R. 537, line 14 to 539, line 14). He corroborated Captain Murray's testimony as to the effect of defective plugs, as follows:

> "Q. Well, I don't know if you were here in court, but you must have heard that one of the plugs had fallen through and into the chain locker? You heard that?
>
> A. Well, in an uneven hole, anything gets sideways, it will fall through.
>
> Q. And if the plug falls through—if the plug falls through——
>
> A. (Interposing) The damage is done" (R. 557, lines 12-18).

> "Q. That's right. In other words, it was essential, among other things, to have kept the cement in good order, isn't that right?
>
> A. To the best of their ability, yes." (R. 558, lines 4-7).

Surrell, the ship's carpenter who had sailed as boatswain on other vessels (R. 50, line 7), said that he had only had one set of plugs aboard the vessel. When one of the plugs broke he had no other to use as a replacement. Thereupon, on orders of the chief mate, he constantly had to stuff the resultant opening with burlap, but to no avail; that the cement, having a tendency to break in a heavy sea, had broken on both sides, but more on the starboard side; that when the concrete first broke, the chief mate told him to stuff the opening with rags for they had no extra plug available; that although he had sailed for a long time in many ratings, including that of boatswain, he had

never before used rags for such a purpose (R. 53, line 21 to 58, line 24).

Captain Murray sought to justify the insufficient makeshift of gunnysacks and rags because the plugs had been "washed out." He stated that in such circumstances it would have been good practice to tie the anchor chains together to eliminate the destruction of the cement caused by the constant friction of the chains against the cement (R. 486, line 3 to 489, line 2).[11] The worn and defective plug was ascribed by Murray as another reason why the concrete did not harden, thus causing it to break (R. 504, lines 8-16).

B. The failure to "lash" or "trice" the anchor chains, also caused the cement or concrete to break.

Murray admitted that tricing (tieing together) the chains would have eliminated their constant sway which would have avoided the wear upon the casement where the cement is applied, thus eliminating the breakdown of the cement (R. 504, lines 17-23; 505, lines 1-5). Tricing the chains is no danger to safety of navigation (R. 505, line 6 to 506, line 24). It could have been done when the concrete broke on the first day after the vessel left San Francisco. It could certainly have been done the day before the accident, for on January 8th several seamen had been in the anchor chain locker (into which the chains hang) to see if it was affected by the entry of the seas which

[11]The failure to tie the chains together and its consequences are discussed in Section III-B of this brief, infra.

had washed into the hawsepipes by reason of the cracked concrete (R. 506, line 25 to 508, line 12).

When the defective plug fell into the chain locker, the chief mate again told the carpenter to apply the cement, thus ignoring the latter's earlier suggestion to "lash" the chains when the cement had broken for the first time about one day after the vessel left San Francisco (8 days before the accident). The carpenter illustrated with Ex. 11 how he had successfully triced the anchor chains on other vessels (R. 47, line 16 to 49, line 8).

The chief mate did not order the appellant to tie the anchor chains although he too had many times triced anchor chains on other vessels to avoid the breaking of concrete at the hawsepipes, without the slightest risk to safety of navigation (R. 142, line 16 to 145, line 6).

Appellee's expert, Captain Healy, conceded that if the chains had been triced their side-to-side movement would have been arrested, thus eliminating the likelihood of the constant break-up of the concrete or cement (R. 556, line 8 to 557, line 2).

C. The absence of catwalks and lifelines at the forecastle head added to the danger which confronted appellant.

The deck log shows that on January 2nd, when the vessel left San Francisco, "all precautions were taken for safety of crew. Catwalks, stairs, life lines, *both fore and aft,* for the safety of crew" (Emphasis supplied) (Res. Ex. B, page 33). When the heavy seas were encountered, the catwalks were washed

away (Res. Ex. B, entry of January 5th, at page 41). Mehallo, the second mate, admitted that the official printed instructions *in front of the deck log,* require official entry as to any rigging and unrigging of life lines and catwalks (R. 464, lines 17-25). But there is no entry after January 2nd, and up to the time libelant was injured that any of these life preserving appurtenances were ever restored, * * * for none of these precautions were in fact ever again undertaken.

Mehallo at first denied that there had been any catwalk on the vessel (R. 422, lines 20-22). However, following a recess at the trial below, he changed his testimony, and referring to appellee's proctor, stated, "Well, he told me there was a catwalk and it was washed away" (R. 443, line 15 to 444, line 2).[12]

The appellant stated that the forward catwalk had washed away and had not been replaced, and that there was no safety line at the forecastle head (R. 133, lines 3-15; 174, lines 3-10). Though there was an insufficient chain rail (R. 173, lines 2-17), he had no right to order a lifeline, for only the chief mate is authorized to do so (R. 174, line 24 to 175, line 5).

[12]In referring to this matter, appellant does not even remotely intend thereby to impugn the motives of appellee's proctor.

IV. WORK PARTIES WERE REQUIRED TO INSPECT THE WINDLASS AND DEFECTIVE CONCRETE BASE AT THE STARBOARD HAWSEPIPES AT LEAST TWICE DAILY.[13]

The chief mate stated that the twice-daily inspections had been so well known to all, that the Army sergeant who always accompanied the ship's personnel on these inspection tours, knew the exact time and place of the commencement of these inspections. Thus, on the day when appellant was injured, the sergeant, without having been told when the inspection was to start, but being aware that the afternoon inspection commenced at 4:00 P.M., was waiting at the No. 5 hatch at that hour on January 9th (R. 514, line 21 to 515, line 6).

A. Only an emergency warranted an inspection on the deck on the day of the accident.

The chief mate admitted that the broken concrete was of "chief concern" on January 7, 8 and 9, and therefore inspections at the hawsepipes on the day when appellant was hurt was an emergent situation (R. 502, lines 5-17).

> "Q. And the need to send a crew of men out forward at the forecastle head in such rough, inclement head (sic) was really one of an emergency situation which was in existence at the forecastle head and because the water was being admitted into the chain locker, isn't that right?
>
> A. That is correct." (R. 502, lines 12-17).

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[13]This point is developed more fully in Section V of the brief, infra.

Thus, except for the broken concrete, Murray would not have sent anyone out on deck because of the extremely bad weather (R. 532, lines 17-24).

Appellee's expert conceded that it is important to examine for broken concrete at the hawsepipes in order to avoid the admission of water into the chain locker. Otherwise, it could cause much damage to stores, water tanks and other equipment situated there. It would also make the bow "heavy at the head." (R. 548, line 10 to 555, line 4). Therefore it was necessary, in these circumstances, to send men out for inspection or repairs (R. 556, lines 1-7).

The second mate likewise had been concerned about the deck cargo on his morning watch on January 9th, and he had sent his "standby" man to check the cargo. However, unlike the disregard for appellant's safety which resulted in the latter's injury, Mehallo said "But I make sure he (the standby man on Mehallo's watch) is in a safe position to do that before I send him" (R. 392, line 7 to 393, line 16).

B. It was necessary to examine the starboard hawsepipe by viewing the front of the windlass.

Appellee imputes negligence to appellant because he examined the hawsepipes for broken concrete in front of, rather than from the rear of, the windlass. The inspection could have been done from the aft end of the windlass, but with considerable difficulty and less effectively.

Surrell, the carpenter stated that in order to inspect for broken concrete from the aft end of the windlass it would have been necessary to crawl over consider-

able machinery (R. 81, line 4 to 82, line 4; Ex. 3). It was more desirable to examine forward of the windlass because there are fewer mechanical impediments to a fuller view of the hawsepipe casement section, as well as of the chain hooks of the "devil's claws" which are also there (R. 82, line 22 to 84, line 16; Ex. 2).

Appellant explained his reasons for the inspections at the bow portion of the vessel when the accident occurred (R. 134, line 5 to 138, line 17; Ex. 15). Though it was somewhat more of a risk, he felt that as a good seaman, he ought to examine the other appurtenances at the bow, in addition to the inspection of the defects at the hawsepipes (R. 312, line 7 to 313, line 18; 330, line 7 to 331, line 11).

Appellee's expert, at first maintaining that the inspection should have been made by examining the rear end of the hawsepipe, conceded that it was perfectly proper for appellant to have conducted the examination as he did (R. 561, line 2 to 563, line 14). He conceded the point as follows:

> "Q. Well, let me ask you very frankly Captain Healy, if you were doing it yourself and you wanted to make perfectly sure that the things that had given so much trouble for days and days were all secured, you would also go around the forward part of it as shown in Libelant's Exhibit 15, wouldn't you?
>
> A. Let me study this picture a minute.
>
> Q. Yes, sir.
>
> A. *In all fairness, I suppose if a person wanted to be perfectly sure, he could walk around*

the fore part and take a look at it.'' (R. 563, lines 4-14) (Emphasis supplied).

C. On the day of the accident, appellant was ordered to check the broken cement and concrete at the starboard hawsepipe of the windlass.

The chief mate stated that he told appellant to make the inspection at 4:00 P.M. on January 9th. Because it was getting dark and the crew's dinner was to be served at 5:00 P.M. the inspection had to be completed before that time (R. 515, lines 13-22).

The second mate stated that sundown was at 1632 (4:32 P.M.) and that the inspection which took at least 20 minutes had to be completed before sundown (R. 462, line 14 to 463, line 13).

An ordinary seaman who was present in the crew's mess room when these instructions were issued, stated that although he did not overhear all of the conversation between the chief mate and the appellant, he heard enough to recall that the chief mate did not ask appellant to meet the former in appellant's quarters before the inspection tour was to begin (R. 25, line 16 to 26, line 11; 34, lines 7-10).

Sarte, the able bodied seaman was on the 4-8 watch. He testified that on January 9th, at about 3:40 P.M. appellant directed him to accompany the latter on the inspection tour. He and appellant met the Army sergeant at 4:00 P.M. at the No. 5 hatch located on the aft end of the vessel, and worked forward to the windlass (R. 91, line 17 to 97, line 11).

Appellant told about the chief mate's orders to him to conduct the inspection on the day he was injured

"before it gets dark." He was not told to notify the officer on the bridge of the inspection tour, nor was he asked to wait in his room to be joined by the chief mate. The inspection started a few minutes after 4:00 P.M., but immediately before that time he had stopped at the chief mate's room, but the latter was not there.[14] (R. 145, line 7 to 148, line 15; 322, lines 10-18; 323, lines 14-19).

The second mate corroborated appellant that the practice was for the chief mate to notify the officer on the bridge when an inspection was to be made, in order to slow down the vessel, and that it is not the duty of an unlicensed seaman to do so (R. 454, line 1 to 455, line 4.)

1. The chief mate did not accompany appellant on inspection tour; this was consistent with prior practice on other tours of inspection.

The chief mate admitted that he did not always accompany others on the inspection trips, although he did so about 90% of the time (R. 508, line 20 to 509, line 22). This was consistent with appellant's testimony in that respect, who also added that when the chief mate was busy[15] he went out without him (R. 138, line 22 to 139, line 19). The chief mate told appellant that he had to relieve the third mate on the bridge before 4 P.M. (which he did). Appellant could have inferred that he was to proceed with the

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[14]The chief mate at that time was busy on the bridge relieving the third mate who had to attend a sick seaman in the latter's quarters. See Section V of this brief, infra.

[15]See footnote No. 14, supra.

inspection without waiting for the chief mate (R. 494, lines 12-18).

Manning, one of the ordinary seamen, testified that 3 hours before the accident occurred, he and an A.B. inspected the topping lift chain at the aft end of the vessel, and according to practice, the chief mate was not with them (R. 26, line 16 to 31, line 2).

2. The officer's bridge was not always notified of work parties on deck; it was not the duty of appellant or any other unlicensed seaman to do so.

When Ordinary Seaman Manning and an A.B. did the work described just immediately above, the watch officer on the bridge was not notified (R. 28, lines 4-9).

The appellant testified that from the very first cargo inspection which took place on the first sailing day, and thereafter, the chief mate, and not he, was to notify the bridge of the work party on deck (R. 134, line 20 to 135, line 16). The second mate corroborated appellant (R. 454, line 1 to 455, line 4). The former also testified that he did not know whether Russell the third mate, whom he had relieved shortly before 4:00 P.M. on January 9th had been notified by the chief mate of the inspection party due to go out at 4:00 P.M. that day[16] (R. 453, lines 14-21). However, Mehallo, the second mate, said he knew nothing about the inspection trip (R. 405, line 2 to 406, line 3).

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[16]Russell was actually so notified by the chief mate. See Section V of this brief, infra.

V. THE SHIP'S OFFICERS KNEW THAT APPELLANT AND OTHERS WERE TO MAKE THE INSPECTION AT TIME OF ACCIDENT.

The chief mate relieved Russell, the third mate on the bridge at about 3:45 P.M. on January 9th, to permit the latter to attend an ailing seaman in the latter's forecastle (R. 494, lines 7-22). At that time he told Russell that there would be an inspection at 4:00 P.M. on the day of the accident. An entry to that effect was logged by Russell which he initialled (Resp. Ex. B, p. 61, entry at "1500"), although by mistake it was recorded as 1500 (3:00 P.M.) instead of 1600 (4:00 P.M.) (R. 500, lines 1-8; 501, lines 1-25; Resp. Ex. B, p. 61). This notice was in keeping with prior practice (R. 509, lines 7-22), and the third mate may have forgotten to report it to the second mate who relieved him at 4:00 P.M. (R. 510, lines 11-22). Such notice to the bridge was consistent with similar notifications between at least January 6th and 9th. Because these daily inspections were at fixed times, and the chief mate was aware of them, the appellant did not specifically tell the chief mate about them on dates prior to January 9th (R. 317, lines 3-25). The chief mate corroborated appellant on this point (R. 492, line 6 to 494, line 6).

The second mate, who testified that he was unaware of the inspection, claimed he was not told about it by either the chief mate or the third mate (R. 394, lines 2-22). However, even if that was so, he failed to see the log entry when he reviewed the work of the prior watch with the third mate (Resp. Ex. B, p.

61 in pencil at bottom of page) when he took over the watch from Third Mate Russell.[17]

A. Officers on the bridge failed to observe the work party; if the watch officer had looked, appellant would have been plainly visible at his work.

Second Mate Mehallo, the officer on the bridge when the accident occurred, had made a routine inspection of the vessel from the *port* wing of the bridge, and saw no one on the deck. He did *not* make an observation from the *starboard* wing—the side of the vessel on which appellant and the others were then working (R. 394, line 23 to 395, line 17). The deck cargo did not obscure his clear view of the forward deck or of the forecastle head (R. 395, line 23 to 396, line 17). Nor did the booms which were "collared" obstruct his view from any portion of the vessel and he had a *perfect view* of the forecastle head (R. 469, lines 16-19). In agreeing that Exs. 5, 6, 7 and 8 were fair representations of the clear and unobstructed views which he had of the forward portion of the ship, including the forecastle head on the day of the accident, he said as to the forecastle area, "It was clean and bare up there" except for the machinery on the forecastle head (R. 401, lines 5-8; 448, line 22 to 450, line 1). He did

[17]Since the log entry erroneously stated the inspection at 1500 (3 P.M.) instead of 1600 (4 P.M.) it may also be that the second mate may have seen it and may then have been under the mistaken belief that the inspection had been completed by the time he took over the watch at 4 P.M.; or he may have seen the entry in his "routine" review (R. 415, lines 6-9) of the prior watch with the third mate and may have been told that it was really a 4 P.M. inspection, which he then promptly must have forgotten.

say that if a seaman, while working at the windlass, is bent over, he could not be seen from the bridge (R. 402, line 13 to 403, line 2).

The chief mate's testimony was in substantial agreement with that of the second mate (R. 511, line 7 to 513, line 8; Exs. 2 and 7). He specifically confirmed the fact that neither the planes on deck, nor the "collared" booms, in any way impeded the view of the forecastle head from the bridge (R. 513, line 15, R. 514, line 16). Testifying with reference to the log entries, he showed that at the time of the accident "visibility was good" (R. 515, line 23 to 516, line 4).

Surrell, the ship's carpenter testified that from his room in the crew's quarters which is on a lower deck from the bridge (Ex. 20), he was in a position to, and did see, the work party just before appellant was hurt (R. 73, line 4 to 75, line 7).

Appellant stated that the windlass machinery, being four and one-half feet high, could be seen from the bridge (See Ex. 2—the two uppermost circular port-holes (windows) shown in background of photograph; see also Ex. 15; see particularly Ex. 5, taken from starboard port-hole of the bridge showing starboard side of forward deck and forecastle head, and Ex. 6, taken from the port port-hole of the bridge showing port side of forward deck and forecastle head) but also conceded that he might have been obscured from the bridge, if he had been bending forward. He denies that he crouched forward as he examined the hawsepipes, although he conceded that he simply

"could have had my head bent down" (R. 332, line 3 to 333, line 23).

Ex. 20 shows the measurements and the dimensions of the block diagram of the engineer's drawing of the main deck of the vessel, and also the area in which appellant was injured. The measurements were stipulated at R. 581 to 584. (See also the markings on Ex. 20, which reflects some of these measurements). The physical measurements (reviewed hereafter) are such as to establish the clear visibility of appellant anywhere forward of the bridge including the place where the accident occurred.

1. **A stand-by lookout at the starboard wing of the bridge would have seen appellant at work; the captain had refused to authorize a lookout there.**

The second mate admitted that he should have had a lookout on the bridge, but that the captain had not authorized one. If he had had such a lookout he would have seen the appellant and the work party. The following is the testimony in this regard:

> "Q. I am speaking of the standby and lookout which generally is required when you are going along in pretty bad weather up on the bridge along with the man on the wheel. Don't you know about that?
>
> A. *The Master had no orders to that extent.*
>
> Q. And that is the reason you didn't have one; is that correct?
>
> A. No.
>
> Q. *So if the Master had given the order, you would have abided by what is good seamanship by having an extra man?*

A. *That is right.*

Q. Now *if you had had that extra man,* in addition to your having made the observation on the port side, *he would then have been able to brace himself and get over on the starboard and take a look, wouldn't he?*

A. *That is right he could.*

Q. And you know now, of course, that the accident happened to Mr. Maiden on the starboard side of the forecastle head?

A. That's right." (R. 422, lines 1-19) (Emphasis supplied.)

B. The bridge officer ordered the vessel to increase speed at 4:21 P.M. on January 9, 1953, while appellant was inspecting the broken cement, thus causing a sudden wave to break over the bow which injured appellant.

The accident happened at 4:21 P.M. (1621) on January 9th. At that moment the engine log (Resp. Ex. C—"Date Jan. 9-10-53" shown in pencil as page 20, the entries between 4 to 8 P.M.), shows that the engine's revolutions per minute, i.e. r.p.m.'s were increased from 40 to 55. The r.p.m.'s had been 50 at 4:10 P.M. (1610) and continued at that rate to 4:18 P.M. (1618) when they were reduced to 40 r.p.m.'s. Three minutes later, at 4:21 P.M. (1621) the r.p.m.'s were increased to 55. The next change occurred four minutes after the accident occurred. This change took place at 4:25 P.M. (1625) when the r.p.m.'s were reduced from 55 to 30.

Melquist, the second engineer (he had previously sailed many times as chief engineer—R. 574, lines 9-20), testified that at 4:10 P.M. the r.p.m.'s were at

50 (R. 576, line 1) at 4:18 P.M. the r.p.m.'s were reduced to 40 (R. 576, lines 8-9); at 4:21 P.M. the r.p.m.'s were increased to 55 (R. 576, lines 5-6); at 4:25 P.M. the r.p.m.'s were brought down to 30 (R. 576, lines 10-14). The reduction from 55 to 30 r.p.m.'s at 4:25 P.M. was four minutes after the accident occurred at 4:21 P.M.—at which time the r.p.m.'s were increased from 40 to 55. Melquist's testimony was as follows:

> "Q. What, if anything, occurred with respect to the speed of the vessel and the revolutions following the change of speed to 55 r.p.m.'s? What happened after that?
>
> A. Well, we maintained a speed of 55 r.p.m.'s, we picked it up at 4:21 *and four minutes later we received a call from the bridge to slow it down, that there was an accident, which was done.*" (R. 576, lines 22-25; 577, lines 1-3). (Emphasis supplied).

He again emphasized, "*I was told to slow her down to 30 r.p.m.'s due to an accident on deck*" (R. 576, lines 11-12). Except in an emergency in the engine room, a change in the speed of the vessel is made by the engine department only upon orders from the bridge (R. 577, lines 15-25). The reduced speed at 30 r.p.m.'s continued from 4:25 P.M. to the end of his watch at 8 P.M. (R. 579, lines 1-7).

Sarte, the A.B. who was with appellant at the time of the accident, testified without contradiction, that the speed of the vessel increased a moment before the wave struck appellant. Sarte, of Philippine extraction, has a language difficulty (R. 97, lines 12-25; 98,

lines 1-5). Yet, *he made it perfectly plain that the vessel, proceeding at reduced speed while the inspection took place, suddenly increased speed just before appellant was hurt.* This is how he stated the matter:

> "Q. All right. Then did you stop at that mast house locker to do any work?
>
> A. Well, while I was checking the dogs of the mast house locker, Mr. Maiden he checked himself the anchor chain locker. While I was checking the—*while I was checking the dogs of the mast house locker I feel the ship is moving fast, so the big wave hit* * * * So the big wave hit the bow and washed the deck. So I turn around and I see Mr. Maiden hanging on the windlass upside down." (R. 98, line 20 to 99, line 8). (Emphasis supplied).

He emphasized the increase in the speed just before appellant was struck by stating:

> "Q. Was the ship at that moment (i.e. when appellant was struck) faster than it was before you got to that point?
>
> A. *No; while we are securing the ship she is moving slow because spray—to avoid spray so much* (R. 99, lines 12-15). (Emphasis supplied).
>
> Q. *Did it move faster at that moment than it had been going before you got to that place?*
>
> A. *Yes.*" (R. 99, lines 22-24). (Emphasis supplied).

On further examination by appellee, Sarte was more emphatic on the point. This is the exact colloquy in the record:

"Q. *And could you actually tell if the vessel's speed changed* on any given occasion when either you were aboard the ship or down on the deck?

A. *I just feel the ship speed*—moving speed because somewhat like—I feel it move fast.

The Witness. *You can feel the movement of the boat.*" (R. 110, lines 8-17). (Emphasis supplied).

As a seaman of 12 years' experience at the time the accident occurred (R. 89, line 21 to 91, line 5) he knew the difference between the sway of a vessel as a result of heavy weather or as the result of the action of a wave, and the way in which a vessel reacts as its speed is increased. His testimony on cross-examination was as follows:

"Q. *Never in your experience has a wave shook the ship?*

A. *Well, this move just up and down; you can feel it steady up and steady down; not that the bow is swinging like that, you know, and the same balance.*

Mr. Darwin. *May the record indicate a swinging motion of the witness' right hand horizontally?*

The Court. *Let the record so show.*" (R. 111, lines 4-10). (Emphasis supplied).

Thus, despite his language difficulty which to some extent limited Sarte in his ability to more fully express himself, he did, nevertheless, graphically depict the action of the vessel when its speed was increased, and its consequent result in causing appellant's injuries.

The chief mate stated that when he was on the bridge shortly before the accident the vessel was proceeding at reduced speed because of the heavy weather (R. 496, line 21 to 497, line 19). That is consistent with Sarte's testimony, who said there was only a slight spray when the inspection started at 4 P.M. It is also consistent with his testimony of the increase of the vessel's speed a moment before appellant was injured (R. 100, lines 11-16; 108, lines 17-25).

Appellant's testimony corroborated the facts above reviewed, as to the testimony of the chief mate, the second engineer, and the able-bodied seaman who accompanied appellant to the forecastle head where he was injured. He too said that when the inspection started at 4 P.M. and up to the time of the accident there were only sprays and no "green" seas (R. 149, lines 3-9). When he started the inspection, the vessel was at reduced speed and continued the same way until just before he was injured (R. 327, lines 10-17; 328, lines 2-21).

1. The deck log entry that the accident happened at "1617", i.e., at 4:17 P.M. on January 9th is wrong.

Reversal of the judgment below does *not* depend upon a resolution of any conflicting evidence, for, in essence, there is no conflict in the credible evidence. Nonetheless, it is well to analyze the testimony of one of appellee's witnesses, to demonstrate the worthlessness of his testimony.[18]

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[18]See also Section VI of this brief, infra.

Mehallo was on the witness stand for direct and part of the cross-examination on a Friday afternoon. At that time he said, first on direct examination, that the wave, which he maintained was the cause of the accident, came over the bow "About ten minutes after 4:00 o'clock (i.e. 1610), I would say approximately" (R. 401, lines 24-25). On cross-examination that same afternoon, he said the same thing (R. 412, lines 4-5). Yet, during the intervening week end he changed his mind, for when he returned for further cross-examination on Monday morning (R. 457, line 1) and at the inadvertent prompting of appellee's proctor that the log shows the accident at 1617 (R. 461, lines 14-15), he then said that the time of the accident was *1617* (R. 461, line 24). He did so, obviously, to have it fit the engine log entry of January 9th (Resp. Ex. C at page 20), that at *1618* the revolutions were at 40—to imply that speed was reduced *before* the accident. It served his purpose to say so. Notwithstanding all the excitement that must have attended the discovery of the accident, he makes the incredible claim that the speed of the vessel could be reduced in only *one* minute! The fact is, that the accident happened at *1621* when the revolutions were *increased* to 55, as shown by the engine log, and that it took about *four minutes* during the excitement which ensued Mehallo's discovery of the accident, to slow the vessel down to 30 revolutions at *1625*. It is at *1625* that Second Engineer Melquist testified *that he received a call to reduce the revolutions down to 30 r.p.m.'s because, as he was told by the bridge,* an *accident had occurred*

shortly before. (This matter has been discussed in another section of this brief.)

Further obvious inconsistencies in Mehallo's testimony as to the time of the accident are as follows: He testified that he made out the official "Personal Injury Report" on the day of the accident when the incident was fresh in his mind, and that it is correct, because "my mind was fresh at that time, and now it is two and one-half years. I don't recall it too well" (R. 459, lines 5-7). Significantly enough, when the matter was fresh in his mind he did state the correct time of the accident (i.e. he was only off by 1 minute), for on the official Personal Injury Report which is part of the ship's log he stated that the accident occurred at *1620* (see report attached to page 59 of Resp. Ex. B). He testified that he was *careful* when he made out that official report, and that he was not hurried or rushed at that time (R. 459, line 2 to 461, line 9).

It was only after all the officers "got together" and talked over the accident, that *he* made out the *self-serving log entry* which states the accident to have occurred at *1617.* The log entry was made by Mehallo after 8:00 P.M., *almost four hours after the accident occurred,* with a sufficient opportunity to "tailor" the facts to suit his apparent need to cover up the fact that he ordered the speed increase at 4:21 P.M. (R. 461, line 25 to 462, line 6; 483, line 14 to 484, line 4).

VI. SECOND MATE MEHALLO WAS NOT A CREDIBLE WITNESS.

It has already been stated that the official "Report of Personal Injury" is attached to the deck log (Resp. Ex. B at page 59), and as such is the official record of the time, place and circumstances of the accident.[19] Item 6 on this report states:

> "6. Injury sustained: (a) Date: 1/9/53 (b) Hour: *1620* (c) To whom first reported: 3rd Mate and 2nd Mate witnessed injury (d) When: *1620.*" (Emphasis supplied).

By an analysis of the evidence, independent of Mehallo's testimony, it has been demonstrated that the accident happened at *1621* (4:21 P.M.) on January 9th,[20] and differs by only one minute from the time of accident contained in the official accident report above referred to. Yet, Mehallo, as already shown, logged the accident at *1617.*

Mehallo was an incredible witness for the following additional reasons, among other things:

1. He said appellant signed on the vessel with him in April, 1952 (R. 407, lines 13-22). That is not so, for appellant signed on in December, 1952 (Cl. Tr. 35, "Findings of Fact" No. 3).

2. He admitted that he at one time wrote that he did *not* witness the accident, which he then changed

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[19]This matter has been discussed for other purposes, under Section V-B-1 of this brief, supra.

[20]See Sections V-B and V-B-1 of this brief, supra.

by writing that he *did* see the accident (R. 474, lines 4-18).[21]

3. He said the engine was operating at *55 to 60* r.p.m.'s "on the governor" when he took over the watch at 4 P.M. on the day of the accident (R. 417, lines 6-24; 419, lines 3-12). But, the official engine log shows 50 r.p.m.'s between 12:40 P.M. (1240) and 4:18 P.M. (1618) (Resp. Ex. C at p. 20).

4. He said the accident happened 4 days after the vessel left San Francisco (R. 419, lines 21-25). The record, however, shows that it occurred on the 9th day after leaving port (Official "Personal Inquiry Report" at page 59 of Resp. Ex. B).

5. The vessel's officers charged him with failure to make official entries into the log books (R. 518, lines 17-24). In fact, he even refused to sign a statement of his own injuries, because he claimed the captain had included "certain statements there which I did not make", such as "Mr. Mehallo who was on the watch at the time failed to enter this in the bridge log" (R. 475, line 22 to 477, line 9).

6. He admitted that he was in error when he testified on direct examination as to the whereabouts of Sarte, the A.B. and the Army Sergeant at the time of the accident. He admitted the error when he was shown that his version of the accident was squarely in conflict with the testimony of Sarte and with the latter's written statement given on the day of the acci-

[21]He tried to explain it away by claiming that he made a "mistake" (R. 474, line 18).

dent (R. 411, line 4 to 413, line 4; 414, line 14 to 415, line 4; Ex. 18).

VII. APPELLANT IS PERMANENTLY DISABLED; HE WILL PROBABLY NEVER SAIL AGAIN.

Appellant's testimony as to his injuries (R. 151, line 16 to 156, line 25; 162, line 21 to 164, line 12; 335-343), his frequent in-patient hospitalizations at the Marine Hospital (R. 157, line 4 to 158, line 4; see also footnote No. 3) and the Findings of Fact Nos. 14-20, incl.; Conclusions of Law Nos. 2, 7 and 8 of the Court below (Cl. Tr. 38-41) is conclusive of the fact that the appellant will probably never sail again. In fact, the U. S. Coast Guard has revoked his seaman's papers because of his disability following his injuries on January 9, 1953 (R. 162, lines 7-20), and he is thus deprived of earning approximately $6,000 a year (R. 158, lines 12-15).

ARGUMENT.

In the *McAllister* case, supra,[22] the Supreme Court has limited judicial review of a judgment in an admiralty case to a consideration of the matters which a reviewing court considers upon a review of a judgment under Rule 52 (a) of the Federal Rules of Civil Procedure. The Court stated (348 U.S. at p. 20):

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court

[22]Cited in footnote 4.

on the entire evidence is left with a definite and firm conviction that a mistake has been committed * * *' * * *''

The instant case is one which requires a reversal, for this Court must inevitably reach the firm conclusion that, based upon a consideration of the entire evidence, a mistake has been committed by the trial court.

A recapitulation of the evidence shows:

(a) Appellant, *an experienced seaman* was not remiss in going upon the forecastle head to check (as had been done previously), and to assist in the repair, if it would have been necessary, the defective concrete at the starboard hawsepipe. Appellee's expert agreed that care required that appellant should have observed not only the hawsepipes, but also the rest of the equipment at the bow at the time of his injury. That the weather was extraordinarily rough from the day the vessel left port to the day (9 days later) when appellant was injured is undisputed. In these circumstances, it was negligent and also a breach of the warranty of seaworthiness[23] to have permitted the conditions to exist at the forecastle head which placed appellant's safety in jeopardy.

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[23]The libel (Cl. Tr. 4-10), combined the statement of claim for negligence with the unseaworthiness count. A suit under the *Jones Act for negligence* and under the *General Maritime Law for unseaworthiness* will lie, as one statement of claim. The Courts have held that there is but a *single wrongful invasion* of a single primary right and that, in essence, the causes of action are separate or independent, requiring no election of remedies. *Williams v. Tidewater Associated Oil Co.*, 227 Fed. 2d 791 (CA 9, 1955), cert. den. 76 S.Ct. 348; *Pate v. Standard Dredging Corp.*, 193 Fed. 2d 498 (CA 5th, 1952). See, also, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316.

(b) *The broken concrete:* The frequency of damage to the concrete at the windlass was avoidable, if appellee had used ordinary care. The first break occurred on the first day out of San Francisco. One or two days after the first break, it again required repairs. It was suggested to the chief mate that the chains, as they hung in the chain locker (Ex. 11), be lashed or triced, but he refused to do so. He admitted, and appellee's expert agreed, that if the chains had been triced, they would not have "swayed" as much and consequently would not have rubbed against the cement. Unnecessary friction would thus have been avoided, and another cause of the breakup of the concrete would have been eliminated. The concrete at the starboard side of the windlass broke badly and continued to break. Another reason for the destruction of the concrete was the defective "plug" (Lib. Ex. 12) which ultimately broke and fell into the chain locker. The plug provides the base for the pouring of the cement, to permit it to harden. When the plug fell into the chain locker, an ineffective makeshift of rags and gunnysacks had to be used, for there was no other plug aboard the vessel. The ship's carpenter said that in his long experience as a carpenter and as a bos'n on other vessels, he had never before had to use rags as a support for the concrete. Repairs were again required on January 7th and 8th and on the morning of January 9th.

(c) The cement was of *inferior quality* and that is another reason why it cracked so frequently. Not only were the wedges, i.e., "plugs", defective, but in ad-

dition, the chief mate, who was in complete charge of the operation of the vessel (subject only to the direction of the captain), said that if the vessel had carried the proper cement "we wouldn't have had any trouble at all" (R. 522, lines 22-25).

(d) *The failure to lash or trice the chains:* In view of the defective cement and the broken "plugs", good seamanship required that the chains be lashed or triced. The chief mate admitted it to be a good technique, with no danger to safety of navigation. While appellee's expert was less enthusiastic about this procedure, he did admit it would have lessened the friction of chains against concrete, which would have avoided its breakage. It was therefore negligence for the chief mate to ignore the carpenter's suggestion to lash the chains eight or nine days before the accident occurred.

(e) *The absence of catwalks or lifelines:* At the outset, lifelines and catwalks were erected as required by the official Coast Guard regulations. When the ravages of the weather destroyed them, no effort at restoration was made. The catwalk and safety line at the forecastle head which had been destroyed was never replaced. Had they been reconstructed, the appellant's serious injuries might very well have been avoided—another element of appellee's disregard for appellant's safety.

(f) *The "emergency" requiring the constant inspection of the windlass:* The weather was such from the beginning of the voyage, and particularly during the last 3 days preceding appellant's accident, as to re-

quire the standing order of the captain that no one was to go on deck except upon his or the chief mate's orders. Since the broken concrete (which could have been avoided by having good instead of defective cement available, or by having proper "plugs", or by tricing the chains), was the "chief concern" of the chief mate, inspections were ordered by him twice daily, to meet this "emergency". Except for the trouble at the windlass, the chief mate would not have sent anyone on deck on January 9th. In these circumstances, even the appellee's expert conceded that the emergent necessity brought appellant to the position of danger—which appellee could have prevented from becoming an "emergency."

(g) *Viewing the hawsepipes from in front instead of from the rear of the windlass:* It was proper, indeed unavoidable, that appellant should inspect the condition of the concrete, fore instead of aft of the windlass. In essence, there was no other way to do the job, and appellee's expert admitted that he would have done it the same way "if a person wanted to be perfectly sure" of the conditions at the hawsepipe. In view of this summary, and the analysis of the evidence under Section IV-B, supra, the trial court's finding (Finding of Fact No. 11, Cl. Tr. 37-38) that libelant "* * * proceeded to a point forward of the anchor windlass in a fully exposed position, with his back to an oncoming sea * * *" and that such inspection should have been made aft of the windlass, is error. To recognize such error, this Court is not confronted with the need to resolve any conflict

in testimony—for there is no conflict. The agreement of all the witnesses on this point, and the physical facts, require a contrary finding.

(h) *The chief mate's order to appellant to make the inspection at 4 P.M. on January 9th:* The court below found (Finding of Fact No. 11, Cl. Tr. 37-38) that appellant himself "was negligent to a marked degree, which negligence was the proximate and controlling cause of his injuries, in that he proceeded out on deck in violation of orders, failed to notify the bridge of his action * * *". Here too, the court had no basis for such a finding because *all* of the evidence is to the contrary.

1. Had appellant "proceeded out on deck in violation of orders"? Sections IV-C and IV-C-1 of the brief, supra, show, among other things there reviewed that the chief mate ordered appellant to do the work "before it gets dark" and before 5 P.M. when the crew was to have its dinner; that appellant was not asked to wait in his room for the chief mate for the latter said he would have to relieve the third mate on the bridge some time before 4 P.M.; that notwithstanding, appellant did go to the chief mate's quarters to look for him on his way to the inspection, but the latter was then on the bridge relieving the third mate.

2. Had appellant "failed to notify the bridge of his action * * *"? The second mate established that it was the practice for the chief mate and not the unlicensed crew members to notify the bridge when a work party is due to go on deck. Furthermore,

as shown in Sections IV-C-1 and IV-C-2, supra, the chief mate did not always accompany the work parties. In fact, that same afternoon, two other men had done an emergency repair job without him, and the bridge was not notified. In any event, as has already been stated, it was not always the practice to notify the "bridge" of work to be done on deck.

3. Moreover, the court below wholly overlooked the evidence that the officers on the bridge had *actual knowledge* that appellant was out on the deck! In Section V, supra, the evidence is fully analyzed, and it shows, among other things, that not only did the chief mate *tell* the third mate of the 4 P.M. work party, but the latter actually entered it in the log and initialed the entry, although he erroneously logged the matter as 1500 (3 P.M.) instead of 1600 (4 P.M.).

(i) *Failure of the "bridge" to see appellant on the forecastle head:* In Section V and in its subsections, the analysis of the evidence fully negates Findings of Fact Nos. 7 and 8 (Cl. Tr. 36-37). A summary of the analysis of the testimony shows, among other things:

1. The ship's officers knew that appellant and others were to make the inspection at the time of the accident. The chief mate had told the third mate about it at 3:45 P.M. The latter entered it in the log. The second mate who then took over the watch must have seen the entry for he reviewed all the entries with the third mate as to the prior watch.

2. The officers on the bridge failed to observe the work party. If the watch officer had looked, the appellant would have been plainly visible at his work.

3. The captain's refusal to authorize a stand-by lookout at the starboard wing of the bridge, in accordance with customary practice in stormy and rough weather, was another reason why appellant was not seen.

4. The photographs in evidence (particularly Exs. 5, 6 and 7) show that the forecastle head is clearly visible. The chief mate said it was clearly visible from the bridge and that neither the planes on deck nor the weather impeded visibility; that anyone on the bridge could see what was going on, at the forward deck and on the foc'sle head; that, notwithstanding the "spray" from the sea, the visibility was good.

5. The second mate admitted that the bow was visible from the bridge portholes, which are shown on Ex. 8; that he had a clear view of the foc'sle head with no obstruction there (only the ship's machinery is on the foc'sle head); he did see appellant as the heavy sea, which injured appellant, hit the bow, for visibility was good; therefore if he had looked *before* appellant was injured, he would have seen him there and he would not have ordered the increase of the vessel's speed at 4:21 P.M.; that in bad weather it is customary to have an additional man on standby on the starboard wing of the bridge, but that the reason there was not one there was that the Master did not authorize an extra man; that if there had been a man there, he would have observed the starboard foc'sle head and appellant could then have been seen at work.

6. The deck diagram (Ex. 20). It was stipulated at the trial as follows:

(a) The length of the forward deck between the break of the midships house (where the bridge is located) to the ladder leading from the deck to the foc'sle head, is 111 feet.

(b) The length of the foc'sle head from the point at which the forward ladder leads to it and the furthermost forward portion of the bow is 92 feet.

(c) The height of the eye level above the main deck (where the planes were located) as one stands looking out of the portholes on the bridge is 27 feet 6 inches.

(d) The height of the foc'sle head above the main deck is 8 feet 6 inches.

(e) The difference in the height between the bridge and the foc'sle head is 19 feet.

The deck diagram with some of the above referred to lines and dimensions drawn on it, shows that the line of vision (as one stands on the bridge and looks towards the bow), clears the mast house locker on the foc'sle head and the windless, so that appellant, when he was forward of the windless, could have been seen as he was working along the 92 foot length of the foc'sle head. Despite the planes which were lashed to the No. 2 and No. 3 hatches, the appellant, and the two others with him, should have been seen somewhere along the 111 foot length of the deck forward of the bridge, but certainly could have been seen on the foc'sle head. Based on the above measurements, i.e. item (a), 111 feet plus item (b), 92 feet, there is a distance of 203 feet of space on which the work party

was engaged in its work forward of the bridge. Ex. 2 is a photograph taken from in front of the windlass, looking toward the bridge. The bridge and its portholes are seen. Certainly, as the chief mate admitted, the officers on the bridge should have seen appellant at the position from which the photographer had taken the photograph shrown in Ex. 2.

The second mate stated that he inspected only from the port wing of the bridge. He also stated that before the accident he looked all over the vessel and could see clearly. The booms did not obstruct his view and he had a "perfect view" of the forecastle head. In the light of the foregoing review, his failure to see appellant and others, forward of the bridge, *if he had actually looked*—is *incredible.*

(j) *The order by the officer on the bridge to increase the speed of the vessel:* The court below in Finding of Fact No. 9 (Cl. Tr. 37) found that "the wave which broke over the bow was unexpected * * *" This too, is error. Again no resolution of conflict in testimony is required to demonstrate the error.[24] The physical facts, the uncontradicted testimony analyzed, supra, at Section V-B and V-B-1, the presumptions which the uncontradicted evidence support,[25] the reasonable inferences which the uncontradicted evidence justify upon a balance of the

[24]Although Section VI, supra, is a discussion of the incredibility of second mate Mehallo as a witness, a finding that the vessel did increase its speed is justified by the record, notwithstanding such testimony.

[25]*U.S. v. Agioi Victores,* 227 F. 2d 571 (CA 9, 1956), at page 574.

probabilities,[26] and the lack of any substantial evidence to support this finding[27] requires a reversal of this and other findings of fact and conclusions of law by which appellant is aggrieved.

The uncontroverted credible testimony of the second engineer, of the A.B. who was at the bow when the accident occurred, of the chief mate's concession that the vessel before the accident was proceeding at "reduced" speed, all of which was corroborated by appellant's testimony that just before he was injured the vessel suddenly increased its speed, the engine log entries, the accident report made out by the second mate on the day of the accident (he was "off" by only one minute when he wrote that the accident occurred at 1620 (4:20 P.M.) instead of at 4:21 P.M. when it actually happened), are further support that the accident occurred at 4:21 P.M., when the engine log shows that the engine's revolutions were increased from 40 to 55 r.p.m.'s.

The analysis of the testimony in section V-B-1, supra, is also conclusive on the point that the self-serving log entry prepared by the second mate, does not reflect the exact time when the accident occurred.

Finding of Fact No. 10 (Cl. Tr. 37) is not borne out by the evidence "* * * At 4:18 P.M. approximately one minute after the wave struck libelant, the vessel's engine speed was further reduced to 40 r.p.m.'s."

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[26]*Griffeth v. Utah Power & Light Co.*, 226 F. 2d 661 (CA 9, 1955)—footnote in dissenting opinion at page 679.

[27]*Peterson v. U.S.*, 224 F. 2d 748 (CA 9, 1955).

As already shown in Section 5-B and 5-B-1, the accident occurred at 4:21 P.M. and not at 4:17.[28] The probabilities are that the decrease of the engine r.p.m.'s from 50 to 40 at 4:18 P.M.—3 minutes before the accident, was in order to slow down the vessel while appellant and others were probably seen by someone on the bridge at that time, and that the increase from 40 to 50 r.p.m.'s at 4:21 P.M. causing the wave to break over the bow was due to the neglect or oversight of the bridge, after appellant may have been seen at work.

Finding of Fact No. 10 continues: "* * * at 4:20 P.M. the engine's speed was increased to 55 r.p.m." There is *no support anywhere in the record for such a finding,* for this change occurred at *4:21* P.M.[29] The balance of the factual findings by the court below in Finding No. 10, is likewise erroneous, because it is based on the erroneous premises of the court below, as shown above.

Findings of Fact Nos. 12 and 13 (Cl. Tr. 38), are likewise in error, since they follow the premises already shown to be wrong in the court's previous findings. So also with Conclusions of Law Nos. 3, 4, 5 and 6 (Cl. Tr. 41).

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[28]As shown hereafter, appellee is liable on the one hand for Jones Act (46 USC 688) negligence. On the other hand, it is also liable for the breach of the warranty of seaworthiness of the vessel, its equipment, and personnel, even if, arguendo, the wave struck at 4:17 P.M. and caused appellant's injuries (see footnote No. 29, infra).

[29]While the difference of one minute would normally be *de minimis,* in this instance it is a crucial error, because one element of the appellee's liability is the exact time at which the increase of speed took place, causing the wave to break over the bow.

SUMMARY OF THE ARGUMENT.

The appellee and the officers of its vessel were obliged to use reasonable care for the safety of appellant and to provide him with *safe appurtenances* as well as a *safe* place in which to work. This duty was breached and, by such violation, the appellee was negligent and its vessel, its appurtenances and its personnel were unseaworthy in that:

1. Soon after the vessel left San Francisco on January 2, to the moment on January 9th when appellant was injured, the weather was rough and the conditions of the sea were extremely bad. Consequently, but principally because of inferior cement and the defective plugs, the concrete at the starboard hawsepipe of the windlass repeatedly cracked and broke down. The failure to lash or trice the chains leading into the chain locker was another cause for the constant breakdown of the concrete. When the appellant was, in these circumstances, ordered to the bow of the vessel to attend the windlass, he was unnecessarily placed in a position of hazard.

2. If the officers on the bridge had looked, or if under the circumstances of the extremely stormy weather the usual practice of providing an additional stand-by lookout on the wings of the bridge had been followed, the appellant and others would have been seen at work, the vessel would not have been speeded up, and the accident would have been avoided.

3. The failure of the vessel to provide the adequate lifesaving devices of a lifeline or a catwalk at the place of work (the evidence is clear that these safeguards had been available when the vessel left port,

but had been washed away and destroyed at sea, and were never replaced), is another reason to sustain appellant's claim.

4. The admission by the chief mate that except for the "emergency" which the appellee itself caused in creating the defective condition at the windlass, the work party would not have been sent forward on the day when appellant was injured (in view of an earlier order by the captain that no work be done on deck that day). This is another ground to afford appellant redress.

5. In addition to the foregoing acts of negligence and unseaworthy conditions of the vessel and its officers, the increase in the speed of the vessel at 4:21 P.M. while appellant and others were on the forecastle head was a disregard for his safety, for he had gone forward to attend the necessary work, upon the lawful command of an officer. The ship's officers knew or had reason to know, that appellant and others were due to perform the work at the windlass, at the time when the accident took place.

6. Appellant was not contributorily negligent in any respect by reason of his failure to notify the bridge. The prior practice for such notice, if any was required, was a duty assumed by the chief mate, who, in any event, did so notify the third mate. The evidence is also clear that the chief mate, himself, apparently did not notify the bridge when he and a work party went out to make repairs at the windlass following the accident, for there is no log entry to that effect. Therefore, there is no implication of negligence in appellants' failure to notify the bridge.

Nor can appellant be charged with negligent exposure to danger by checking the broken concrete fore, instead of aft of the windlass, since the photographs in evidence, the deck diagram (Ex. 20) and the testimony make it abundantly clear that it was proper to make the inspection in front of the windlass. Without conceding the point of any possible contributory negligence, but only for the sake of discussion, the law in Admiralty is that, even if appellant was guilty of contributory negligence, then he would be chargeable only to the extent that his negligence contributed to his injury.[30]

7. Appellant is entitled to recover even if, for the sake of discussion, it is assumed that the vessel's speed was not increased at the time of the accident, because any one, any number, or all of the matters just stated as acts of negligence and/or unseaworthiness of the vessel, its appurtenances or its crew, warrants a recovery.

(a) Any of the above elements of appellee's fault, either alone or in combination, justifies a finding in appellant's favor, for unseaworthiness of the vessel, its equipment or its personnel.[31]

(b) The record also overwhelmingly establishes appellee's negligence. The Jones Act (46 U.S.C. Sec. 688) has had engrafted upon it, the Federal Employers' Liability Act as a part of

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[30]Appellant's negligence, if any, does not affect his right to recover for the appellee's breach of the traditional warranty of seaworthiness since appellee's liability in that regard is "a species of liability without fault". *The Osceola,* 189 U.S. 158; *Mahnich v. Southern S.S. Co.,* 321 U.S. 96.

[31]See footnote No. 30, supra.

> the maritime law applicable herein (45 U.S.C. Sec. 51, as amended in 1939). Section 1 of the latter Act provides for liability *"in whole or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, machinery * * * or other equipment" (Emphasis supplied).

Appellant's injuries were caused by the *whole* series of appellee's negligent acts above reviewed. Certainly, his present physical state was caused at the very least *in part,* by any, some, or all of those negligent acts.

The question therefore before this Court, simply stated, is whether under Admiralty Rule 46½, and under the *McAllister* case, supra, the record is such that the findings of the trial court should be set aside as "clearly erroneous". Although, arguendo, there may be some slight evidence to support the judgment, a review of all of the evidence must logically bring this Court to the definite and firm conviction that a mistake has been committed.

> *McAllister* case, supra;
>
> *States Steamship Co. v. Permanente Steamship Co.,* 231 F. 2d 82 at page 85 (C.A. 9, 1956);
>
> *U.S. ex rel. Accardi v. Shaughnessy,* 219 F. 2d 77, at page 82 (C.A. 2, 1955).

The record is replete with credible evidence, including a virtual confession by the chief mate, supported by the credible testimony of all of the

witnesses, all of which was corroborated by the documentary proof, that the presumptions are such as to sustain appellant's position. The learned Court below failed to give appropriate weight to these presumptions.

U.S. v. Agioi Victores, 227 F. 2d 571, at page 574 (C.A. 9, 1955).

While it can not be gainsaid, as this Court has so well stated the matter in *City of Long Beach v. American President Lines,* 223 F. 2d 853 at page 855 that:

> "The ghost of trial de novo in this intermediate appellate court has been laid at rest with finality in *McAllister v. U.S.,* 348 U.S. 19 * * *"

it is still necessary for this Court to consider the theories of liability urged by appellant and the conflict, if any, in the evidence. In *Pure Oil v. Union Barge Line,* 227 F. 2d 868 (C.A. 6, 1955), a collision case, tried in Admiralty, the court there considered and fully discussed the theories of liability of both sides, and found no impediment to a reversal of the lower court, at the same time acknowledging the limits established by the *McAllister* case.

This Court will still examine the record for the balance of the probabilities, to find the reasonable inferences which the totality of the credible evidence will justify.

McAllister case, supra, at page 22;

Griffeth v. Utah Power & Light Co., 226 F. 2d 661 (footnote on page 679 of the dissenting opinion).

The Supreme Court in *McAllister,* at page 22 said:

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved * * *".

In the instant case, even if it can not be said to be so with absolute certainty, the *balance of all of the probabilities* is such, as to lead to the reasonable inferences which sustain the appellants' cause.

CONCLUSION.

It is respectfully submitted that the portions of the judgment below, from which appellant has appealed, should be reversed.

Dated, San Francisco, California,
June 4, 1957.

JAY A. DARWIN,
Proctor for Appellant,
Louis L. Maiden.